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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

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INDEX

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT:	
I. The Double Jeopardy Clause of the Fifth Amendment Is Not Applicable To The States Through the Fourteenth Amendment	5
II. The Petitioner was not "Twice Put In Jeopardy" in this Case	16
III. The Petitioner Was Not Prejudiced by Standing Trial on the Larceny Charge Together with the Charge of Burglary	25
IV. Petitioner Was Not Subjected to Double Jeopardy In Another Form When He Received a Greater Punishment For the Same Offense In The Second Trial	25
CONCLUSION	30

TABLE OF CITATIONS

Cases

Adamson v. California, 332 U.S. 46	9
Ex Parte in the Matter of Bain, 121 U.S. 849 (1887)	19
Barger v. State, 235 Md. 556, 202 A. 2d 344 (1964)	19, 20
Barron v. Baltimore, 7 Det. 243 (1833)	8
Bartkus v. Illinois, 359 U.S. 121, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959)	7, 8, 13

PAGE

Bennett v. State, 229 Md. 208, 182 A. 2d 815 (1962) ... 17
Benton v. State, 1 Md. App. 647, 232 A. 2d 541 (1967) 5
Brock v. North Carolina, 344 U.S. 424 (1953) ... 12, 13
Cichos v. Illinois, 385 U.S. 76 (1966) ... 10, 14, 25
Ciucci v. Illinois, 356 U.S. 571 (1958) ... 13
Coke v. United States (S.D. N.Y. 1968) 280 F. Supp. 97 ... 29
Duncan v. Louisiana, 36 LW 4414 ... 10, 15
Eggleston v. State, 209 Md. 504, 121 A. 2d 698 (1956) 17
Ellis v. Dixon, 349 U.S. 458, 99 L. Ed. 1231, 75 S. Ct. 850 (1955) reh. denied 350 U.S. 855, 100 L. Ed. 759, 76 S. Ct. 37 (1955) ... 26
Ford v. State, 237 Md. 266, 205 A. 2d 809 (1965) ... 16
Gori v. United States, 367 U.S. 364 (1961) ... 24
Green v. United States, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957) ... 6, 19, 20
Gryger v. Burke, 334 U.S. 728 (1948) ... 12
Harris v. State, 194 Md. 288, 71 A. 2d 36 (1950) ... 8
Hays v. Wainwright v. State, 240 Md. 482 ... 21
Hoag v. New Jersey, 356 U.S. 464 (1958) ... 13
Hobbs v. State, 231 Md. 533, cert. denied 375 U.S. 914 (1963) ... 27
Hoffman v. State, 20 Md. 425 (1863) ... 17
Johnson v. New Jersey, 384 U.S. 719, 16 L. Ed. 2d 882 (1966) ... 22
Kenny v. State, 121 Md. 120, 87 A. 1109 (1913) ... 17
Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) ... 11, 15
Moon v. State, 1 Md. App. 569, 232 A. 2d 277 (1967) ... 5, 27
Moon v. State, ... Md. ..., 243 A. 2d 564 (1968) ... 5
Moquin v. State, 216 Md. 524, 140 A. 2d 914 (1958) ... 27
O'Neil v. Vermont, 144 U.S. 323 ... 9
Palko v. Connecticut, 302 U.S. 319 (1937) ... 10, 11, 13, 14, 15

PAGE

Patton v. North Carolina, 381 F. 2d 636 (4 Cir. 1967) 26, 27
Pointer v. Texas, 380 U.S. 400 (1965) 15
Rice v. Simpson, 274 F. Supp. 116 (M.D. Ala.) 29
Robb v. State, 190 Md. 641, 60 A. 2d 211 (1948) 17
Salisbury v. Grimes (Ga. 1967) 158 S.E. 2d 412 29
Schowgurow v. State, 240 Md. 121, 213 A. 2d 475 (1965) 3, 20, 22, 23, 27
Smith v. State, 240 Md. 464, 214 A. 2d 563 (1965) 3, 21
State v. Adams, 196 Md. 341, 76 A. 2d 575 (1950) 17
State v. Brown (N.C. 1967), 156 S.E. 2d 272 29
State v. Jacques (Super. Ct. N.J. 1968) 239 A. 2d 252 29
State v. Madison, 240 Md. 265, 213 A. 2d 880 (1965) 3, 4, 21
State ex rel Shatzer v. Warden, 192 Md. 728, 64 A. 2d 711 (1949) 17
Stearns v. State, 81 Md. 341, 32 A. 282 (1895) 17
Tate v. State, 236 Md. 312, 203 A. 2d 882 (1964) 17
Torcaso v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961) 3
United States v. Ball, 163 U.S. 662 (1896) 18
United States ex rel Davis v. Brierly (M.D. Pa. 1967), 274 F. Supp. 1006 29
United States v. Ellenbogen (2 Cir. 1966) 365 F. 2d 982 29
United States v. Fairhurst (3 Cir. 1968), 388 F. 2d 825 29
United States v. Lewis, 173 F. Supp. 674 (D.C.D. Colo. 1959) 19
United States v. Sanders (E.D. Cal. 1967), 272 F. Supp. 245 29
United States ex rel. Starner v. Russell (3 Cir. 1967), 378 F. 2d 808, cert. denied 389 U.S. 889 (1967) 29
United States v. White (7 Cir. 1967), 382 F. 2d 445 29
Wade v. Hunter, 336 U.S. 684 (1949) 24

PAGE

Wampler v. Warden, 231 Md. 639, 191 A. 2d 594 (1963) 16-17
Wolkoff v. United States (C.C.A. Ohio), 84 F. 2d 17 (1936) 19

Statutes and Rules

Constitution of Maryland 16
Constitution of the United States:
Fifth Amendment 2, 7, 14, 16, 17, 19, 26
Fourteenth Amendment 2, 7, 8, 9, 10, 11, 13, 14, 16, 20
Sixth Amendment 9
Constitution of the United States, Bill of Rights 8, 9, 13, 14
Maryland Declaration of Rights, Article 26 ..... 3, 20
Revised Rules of the Supreme Court of the United States, Title 28, Rule 19 26

Miscellaneous

4 Blackstones' Commentaries:
p. 335 6
p. 336 (3d Kerr Ed. 1862) 6
Corpus Juris Secundum, Criminal Law, §246, Footnote 65 19
2 Hale, Pleas of the Crown, 240-50 (1st Am. Ed. 1847) 6
2 Hawkins, Pleas of the Crown 515 (8th Ed. 1824) 6

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland, A. 8 to 13, entered on August 17, 1967, is reported at 1 Md. App. 647, 232 A. 2d 541 (1967). Appellant sought certiorari from the Court of Appeals of Maryland which was denied without an opinion on December 7, 1967.

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief.

QUESTIONS PRESENTED

1. Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

2. If so, was the Petitioner "twice put in jeopardy" in this case?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Article Five of the Constitution of the United States of America:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied.)

2. Article Fourteen of the Constitution of the United States of America

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Petitioner, on April 22, 1965, was indicted in the Circuit Court for Prince George's County in Criminal Trial No. 5595 for burglary, common law housebreaking and larceny. At trial, the State abandoned prosecution on the second count of the indictment, housebreaking, and the jury returned a verdict of guilty as to the first count, burglary, and not guilty as to the third count, larceny. Petitioner was sentenced on the burglary conviction to ten years in the Maryland House of Correction.

Thereafter, the Petitioner appealed to the Court of Appeals of Maryland, No. 469 September Term, 1965. That court remanded the conviction on the basis of *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965), and *State v. Madison*, 240 Md. 265, 213 A. 2d 889 (1965). In *Schowgurow*, the Court of Appeals held that because of this Honorable Court's decisions, the exclusion of persons from juries because they did not believe in God was invalid. By that decision, in all pending and future cases indictments by Grand Juries and criminal trials by Petit Juries selected under the exclusionary method formerly prescribed by Article 36 of Maryland's Declaration of Rights were declared defective. *State v. Madison, supra.* In *Schowgurow* and *Madison*, the Court of Appeals of Maryland did not hold that the Grand Jurors who indicted Schowgurow and Madison were not competent and qualified, nor did they hold in either case that the oaths administered to the jurors were unconstitutional or illegal because of their reference to God. It was only the fact that all prospective jurors were required to take the oath irrespective of their individual beliefs in God that under *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961) rendered the method of selection invalid. *Smith v. State*, 240 Md. 464, 214 A. 2d 563 (1965). Once it was established that the

method of Grand Jurors' selection was unconstitutional, any accused indicted by such a jury had the right to have the indictment dismissed. *State v. Madison, supra.* It was under these circumstances that the Petitioner exercised his right to timely challenge his first indictment which resulted in said indictment being rendered invalid.

Subsequently, on June 3, 1966, the Petitioner was reindicted in Case Number 6369 in the Circuit Court for Prince George's County, Maryland. He was again charged with burglary, common law housebreaking and larceny. At the trial on August 11, 1966, the State again abandoned prosecution of Count II of the indictment, to wit, common law housebreaking. Petitioner was tried on Count I, burglary, and Count III, larceny. The jury returned a verdict of guilty on both counts of the indictment, and he was sentenced to 15 years of imprisonment on Count I, burglary, and 5 years on Count III, larceny, the sentences to run concurrently.

From this judgment and sentence imposed by the Circuit Court for Prince George's County, Petitioner filed an appeal to the Court of Special Appeals of Maryland, at which time the following issues were argued:

A. Did Appellant's election to be re-indicted and his subsequent conviction constitute double jeopardy?

B. Was Appellant prejudiced as a result of the larceny charge?

C. Was there abuse of discretion by the trial court in failing to grant a removal of the case to another jurisdiction?

D. Could the trial court instruct the jury in mandatory terms not to infer guilt from the Appellant's refusal to testify?

The Court of Special Appeals of Maryland affirmed the lower court's findings on August 17, 1967, as per its opinion (A. 8 to 13), reported as *Benton v. State*, 1 Md. App. 647, 232 A. 2d 541 (1967). Petition for certiorari was denied without opinion by the Court of Appeals of Maryland on December 7, 1967.

On the 29th day of December, 1967, Petitioner filed a Petition for a Writ of Habeas Corpus, Civil No. 18872, in the United States District Court for the District of Maryland, setting forth the same six questions which were presented to this Honorable Court in his "Petition for Writ of Certiorari to the Maryland Court of Appeals". Action on said Petition had been held in abeyance by the court pending the Petitioner's exhaustion of available state remedies and the determination by the Court of Appeals of Maryland of the case of *Moon v. State*, 1 Md. App. 569, 232 A. 2d 277 (1967), on which said case the Court of Appeals of Maryland had granted certiorari from the Court of Special Appeals of Maryland. The *Moon* case raises the question presented by *Patton v. N. Car.*, 381 F. 2d 636 (4 Cir. 1967). The Court of Appeals of Maryland's opinion in the *Moon* case was filed on July 3, 1968, and is cited as ..... Md. ....., 243 A. 2d 564 (1968). At this writing, the Petitioner is seeking a hearing in the District Court on his Petition.

ARGUMENT

I.

The Double Jeopardy Clause of the Fifth Amendment Is Not Applicable to the States Through the Fourteenth Amendment.

That the "state" could not twice put a man in jeopardy for the same offense after an acquittal at a regular trial on an *adequate* indictment was well established at common

law. 2 Hawkins, *Pleas of the Crown*, 515 (8th ed. 1824); 2 Hale, *Pleas of the Crown*, 240-50 (1st Am. ed. 1847). In 4 *Blackstone's Commentaries*, it is said at p. 335:

> "[T]he plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime."

This plea in bar was not available if the former indictment of process had been defective or the trial court had lacked jurisdiction because in such circumstances the accused "has not been in jeopardy." 4 Blackstone *Commentaries* 336 (3d Kerr Edition 1862).

In *Green v. United States*, 355 U.S. 184, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957), Justice Black, speaking for the majority of this Honorable Court, stated at page 189:

> "At common law a convicted person could not obtain a new trial by appeal except in certain narrow instances.[6] As this harsh rule was discarded courts and legislatures provided that if a defendant obtained the reversal of a conviction by his own appeal he could be tried again for the same offense.[7] Most courts regarded the new trial as a second jeopardy but justified this on the ground that the appellant had 'waived' his plea of former jeopardy by asking that the conviction be set aside.[8] Other courts viewed the second trial as continuing the same jeopardy which had attached at the first trial by reasoning that jeopardy did not come to an end until the accused was acquitted or his conviction became final.[9] But whatever the rationalization, this Court has also held that a defendant can be tried a second time for an offense when his prior conviction

for that same offense had been set aside on appeal. United States v. Ball, 163 U.S. 662, 41 L. ed. 300, 16 S. Ct. 1192.

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[6] See 1 Stephen, History of the Criminal Law of England, ch. x; United States v. Gilbert (CC Mass.) 2 Sumn 19, F. Cas. No. 15204, p. 1287.

[7] Under English law the appellate court has no power to order a new trial after any appeal except in certain cases where the first trial was a complete 'nullity,' as for example when the trial court was without jurisdiction over the person or subject matter. See 4 Stephen, Commentaries on the Laws of England (21st ed. 1950), 284. The English appellate court does have power to substitute a finding of guilt of a lesser offense if the evidence warrants, but it cannot find the defendant guilty of an offense for which he was acquitted or increase his sentence. See 10 Halsbury, Laws of England, Simonds ed. 1955), 539-541, and the cases cited there.

[8] See, e.g., Brewster v. Swope (C.A. 9th Cal.) 180 F. 2d 984 State v. McCord, 8 Kan. 232, 12 Am. Rep. 469; Cross v. Commonwealth, 195 Va. 62, 77 S.E. 2d 447; Smith v. State, 106 Wis. 102, 219 N.W. 270.

[9] See, e.g., State v. Aus, 105 Mont. 82, 69 P. 2d 584. Cf. Griffin v. Illinois, 351 U.S. 12, 18, 100 L. ed. 801, 898, 76 S. Ct. 585, 55 A.L.R. 2d 1055."

The basic common law principle of double jeopardy was incorporated into the Fifth Amendment to the Constitution of the United States. For a discussion of the history, significance and scope of said double jeopardy protection, see *Bartkus v. Illinois*, 359 U.S. 121, 150-155, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959) (Black, J., dissenting).

Prohibitions against double jeopardy are found in the constitutions of all but five States — Connecticut, Maryland, Massachusetts, North Carolina and Vermont. However, even though there is no prohibition in the State Con-

stitution prohibiting double jeopardy, protection against it is available in Maryland by way of the common law.

Prior to the adoption of the Fourteenth Amendment, there was no the slightest doubt that the first eight amendments, often referred to as the "Bill of Rights" applied to and limited the power of the federal government but were not applicable to the states. See *Barron v. Baltimore*, 7 Det 243 (1833); *Harris v. State*, 194 Md. 288, 71 A. 2d 36 (1950). Since the adoption of the Fourteenth Amendment, however, it has been held from time to time — more frequently in recent years than before — that under the due process clause of that amendment, certain basic or fundamental rights, some of which are specifically contained in the Bill of Rights, are protected from violation by the states.

In a comprehensive review of the relevant historical material surrounding the adoption of the Fourteenth Amendment, Justice Frankfurter speaking for the majority of this Honorable Court in *Bartkus v. Illinois*, at page 124, said:

> "We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the States any of the provisions of the first eight amendments as such. The relevant historical opinions have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a shorthand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States."

Although it has never been accepted by this Court, several members of the Court have taken the position that the Fourteenth Amendment makes all of the provisions of

the Bill of Rights applicable to the States. See *Duncan v. Louisiana*, 36 L.W. 4414, ... U.S. ..... (concurring opinion, Black, J.); *Adamson v. California*, 332 U.S. 46, 71 (dissenting opinion, Black, J.); *O'Neil v. Vermont*, 144 U.S. 323, 366-370.

However, the most current view on the subject is *Duncan, supra*, where the Court maintained a trial by jury in criminal cases is fundamental to the American scheme of justice and held that the Fourteenth Amendment guarantees right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. The majority opinion, written by Justice White, stated at page 4415:

> "The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty, or property, without due process of law.' In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State [*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897)]; the rights of speech, press, and religion covered by the First Amendment [*Fiske v. Kansas*, 274 U.S. 380 (1927)]; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized [*Mapp v. Ohio*, 367 U.S. 643 (1961)]; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination [*Malloy v. Hogan*, 378 U.S. 1 (1964)]; and the Sixth Amendment rights to counsel [*Gideon v. Wainwright*, 372 U.S. 335 (1963)] to a speedy [*Klopfer v. North Carolina*, 386 U.S. 213 (1967)] and public [*In re Oliver*, 333 U.S. 257 (1948)] trial, to confrontation of opposing witnesses [*Pointer v. Texas*, 380 U.S. 400 (1965)], and

to compulsory process for obtaining witnesses [*Washington v. Texas*, 388 U.S. 14 (1967)].

"The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those ' "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," ' *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is 'basic in our system of jurisprudence.' *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is 'a fundamental right, essential to a fair trial,' *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965)."

But see the dissenting opinion of Mr. Justice Harlan, whom Mr. Justice Stewart joins in *Duncan, supra*.

While the broad language of *Duncan* and the cases cited therein indicate a strong future possibility of such incorporation, the protection against double jeopardy of the Fifth Amendment has never specifically been incorporated within the scope of the due process clause of the Fourteenth Amendment by this Court. It is conceded that in some circumstances, retrial would be so inconsistent with the concept of fundamental fairness as to be barred by the due process clause of the Fourteenth Amendment. A review of the double jeopardy decisions for the past thirty years — From *Palko* to *Cichos* — reveals that this Court has rejected the incorporation theory as to double jeopardy or has disposed of the cases on other ground. The central theme has been that "due process of law" requires only that criminal trials be fundamentally fair.

In *Palko v. Connecticut*, 302 U.S. 319 (1937), it was contended that the Fourteenth Amendment made all of the

specific guarantees of the Bill of Rights applicable to the states, but the Court rejected that idea and stated instead that certain of the privileges and immunities of the Bill of Rights had been taken over and brought within the Fourteenth Amendment by a process of absorption, namely, those that protect the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." In *Palko*, the defendant was indicted and tried for first degree murder and the jury returned a verdict of murder in the second degree. The State, alleging a prejudicial error of law, appealed the conviction. On appeal the conviction was reversed and a new trial was ordered. At the second trial, the objection of the defendant that he was being placed in jeopardy twice for the same offense in violation of the Fourteenth Amendment was overruled and the jury returned a verdict of murder in the first degree. The Court, in affirming the second conviction stated that the lack of protection afforded by the State of Connecticut against double jeopardy in such circumstances did not violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Ten years after *Palko* the Court was again confronted with the question of whether a defendant was entitled to constitutional protection from state action because he had been twice placed in jeopardy. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), involving an unsuccessful execution and the desire to try again, four of the justices concluded that there was "no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution." Mr. Justice Frankfurter, concurring to form the majority, stated that "the Due Process Clause * * * expresses a demand for civilized standards which are not defined by the specifically enu-

merated guarantees of the Bill of Rights [in that they] * * * neither contain the particularities of the first eight amendments nor are they confined to them" and concluded that the state action in that case did not offend a principle of justice rooted in the tradition and conscience of the people.

The question of double jeopardy was raised again in *Gryger v. Burke*, 334 U.S. 728 (1948), by a petitioner who was convicted of being a multiple offender and was sentenced to life imprisonment in a state court. Again, the Court instead of saying that constitutional protection could not be invoked against the states in some cases of double jeopardy, decided that double jeopardy was not involved. Five years later in *Brock v. North Carolina*, 344 U.S. 424 (1953), where a motion for a mistrial was granted after witnesses for the state refused to testify, the Court answered the claim of the petitioner that his retrial amounted to double jeopardy by saying: "the pattern here * * * does not deny the fundamental essentials of a trial, 'the very essence of a scheme of ordered justice,' which is due process." Again the Court, although not rejecting the idea that due process imposes some limitations on the power of a state to reprosecute an individual for the same crime, restated the basic questions asked in *Palko, supra:*

> "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?"

and, in answering the questions in the negative, said:

> "As in all cases involving what is or is not due process, so in this case, no hard and fast rule can be laid down. The pattern of due process is picked out in the facts and circumstances of each case."

Hoag v. New Jersey, 356 U.S. 464 (1958), and *Ciucci v. Illinois*, 356 U.S. 571 (1958), involved the problems of successive prosecutions by the two states of several robberies in the first case, and homicides, in the second, arising out of single occurrences. In these cases, the Court recognized that the Fourteenth Amendment does impose some limitations on the state in the area of double jeopardy, but stating that "the question in any given case is whether [the course followed] has led to fundamental unfairness," refused to grant constitutional protection from the states' actions because there was no showing that due process had been violated.

More recently, in *Bartkus v. Illinois, supra*, where a state prosecution followed an acquittal in a federal district court for the same offense — robbing a federally insured savings and loan association — a majority of the Court acknowledged the fact that the attack on the constitutionality of the state's action rested on the due process clause of the Fourteenth Amendment since that clause "does not apply to the States any of the provisions of the first eight amendments *as such*," but based their decision on the premise that crimes committed by the same act against two sovereignties were different crimes. The Court, however, at p. 127 of 359 U.S., quoted the statement of Justice Cardozo in *Palko, supra:*

> "'In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.' 302 U.S., at 324-325."

and concluded that "decisions under the Due Process Clause require close and perceptive inquiry into fundamental principles of our society."

The Court dismissed a writ of certiorari as improvidently granted, without reaching the issue whether the Fifth Amendment's prohibition against double jeopardy is applicable to state court prosecutions under the due process clause of the Fourteenth Amendment in *Cichos v. Indiana, supra.* In an opinion by Mr. Justice White, it was held that the retrial of the petitioner for involuntary manslaughter did not place him twice in jeopardy since under Indiana law, the jury's silence at first trial with respect to involuntary manslaughter did not amount to an acquittal on such charge.

In the *Palko* to *Cichos* line of cases, the Court avoided the broader question of whether the due process clause of the Fourteenth Amendment imposed any restrictions on a state's power to reprosecute an individual for the same crime by delineating the narrower question whether this particular "kind of double jeopardy" exceeded the limits imposed upon the states by the due process clause of the Fourteenth Amendment. In articulating the "rationalizing principle" of the due process clause, Mr. Justice Cardozo in *Palko* perceived: the due process clause of the Fourteenth Amendment prohibited the states from enforcing their criminal laws at the cost of violating some fundamental precept of justice imposing a "hardship so acute and shocking that our policy will not endure it." It is submitted that the criteria to be applied in double jeopardy case is that "due process of law" requires only that the Petitioner not be denied any element of fundamental procedural fairness.

It has been recognized that certain of the restrictions emanating from the double jeopardy provision of the Fifth Amendment are, unlike many of the provisions of the Bill of Rights already absorbed, "technical ramifications," *Brock v. State of North Carolina, supra,* at 345 (Vinson, C.J., (dis-

senting) and that some of the cases involving that provision turn on "subtle technical controversies," id., at 428, 73 S. Ct. 349 (Frankfurter, J., concurring), "engendered by technical aspects of double jeopardy as enshrined in the Fifth Amendment," *State of Louisiana ex rel. Francis v. Resweber, supra* (Frankfurter, J., concurring). Moreover, Justice Goldberg's concurrence in *Pointer v. State of Texas*, 380 U.S. 400 (1965), announcing his acceptance of the process of absorption, find this process to be conceived in *Palko* — which is both consistent and suggestive of a version of the doctrine of selective incorporation which permits only the basic core of the Double Jeopardy Clause of the Fifth Amendment to be absorbed by the Fourteenth Amendment.

In view of the diverse reasoning by many of the states concerning double jeopardy, it does not appear that the federal standard of double jeopardy can be deemed so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine, which interpretations of their own constitutions, statutes and common law are primarily the prerogative of the states. Mr. Justice Harlan in his dissenting opinion in *Duncan*, stated at page 4422:

> "The States have always borne primary responsibility for operating the machinery of criminal justice within their borders, and adapting it to their particular circumstances. In exercising this responsibility, each State is compelled to conform its procedures to the requirements of the Federal Constitution. The Due Process Clause of the Fourteenth Amendment requires that those procedures be fundamentally fair in all respects. It does not, in my view, impose or encourage nationwide uniformity for its own sake; it does not command adherence to forms that happen to be old; and it does not impose on the States the rules than

may be in force in the federal courts except where such rules are also found to be essential to basic fairness."

In summary, the question is not whether double jeopardy is an ancient principle of law, which it is; nor whether it played a significant role in the administration of criminal justice, which it does; nor whether it will endure, which it shall. The question in this case is: Did Petitioner's election to be re-indicted and his subsequent conviction constitute double jeopardy by the State of Maryland? On the basis of the historical background of double jeopardy, the present interpretation of that principle, the facts of the instant case, and the procedural safeguards employed by the Courts of Maryland, the answer must be in the negative.

For the several reasons here advanced, the double jeopardy clause of the Fifth Amendment is not applicable to the states through the Fourteenth Amendment.

II.

The Petitioner Was Not "Twice Put In Jeopardy" In This Case.

Assuming, *arguendo*, that the double jeopardy clause of the Fifth Amendment was applicable to the states through the Fourteenth Amendment, it is the Respondent's contention that under the circumstances of the instant case the Petitioner's rights under the double jeopardy clause were not violated.

The basic common law principle of double jeopardy was incorporated in the Constitutions of most of the states, Maryland being one of the notable exceptions. However, even though there is no provision in the State Constitution prohibiting double jeopardy, protection against it is available in this State by way of the common law. See *Ford v. State*, 237 Md. 266, 269, 205 A. 2d 809 (1965); *Wampler*

v. Warden, 231 Md. 639, 645, 191 A. 2d 594 (1963); *Bennett v. State,* 229 Md. 208, 212, 182 A. 2d 815 (1962); *Moquin v. State, supra; Eggleston v. State,* 209 Md. 504, 513, 121 A. 2d 698 (1956); *State v. Adams,* 196 Md. 341, 344, 76 A. 2d 575 (1950); *Robb v. State,* 190 Md. 641, 650, 60 A. 2d 211 (1948).

In an early case — *Hoffman v. State,* 20 Md. 425 (1863), where a jury, after being sworn and charged to try the accused was dismissed because the witness did not appear, and, on the second trial, the accused was convicted and sentenced — our predecessors, in adopting the interpretation of the United States' Courts that the Fifth Amendment clause stating that no person shall be "subject for the same offense to be twice put in jeopardy" (being a 'maxim imbedded in the very elements of the common law') meant nothing more than "that where there had been a final verdict either of acquittal or conviction, on an *adequate indictment,* the defendant could not be a second time placed in jeopardy for the particular offense," held that the accused, not having been twice put in jeopardy, was not entitled to be discharged.

In conformity with the common law rule, it has been repeatedly held in the State of Maryland that when a traverser has been tried on an indictment or information that is invalid, he is not in jeopardy and he may be indicted and tried again. *Tate v. State,* 236 Md. 312, 203 A. 2d 882 (1964); *State ex rel Shatzer v. Warden,* 192 Md. 728, 64 A. 2d 711 (1949); *Kenny v. State,* 121 Md. 120, 87 A. 1109 (1913); *Stearns v. State,* 81 Md. 341, 32 A. 282 (1895). Since the first indictment was ruled invalid, the case at bar falls clearly within the rule set forth in the above cases. It is stating the obvious that if an indictment is invalid, all counts of said indictment are invalid.

The Federal and Maryland Law on the aspect of double jeopardy at issue is apposite. The Petitioner relies on the case of *United States v. Ball,* 163 U.S. 662 (1896), which is distinguishable on the facts from the instant case insofar as it concerned a defective or deficient indictment rather than an invalid indictment, which deprives the Court of jurisdiction. In *Ball, supra,* an indictment had been returned against three defendants charging first degree murder; two of the defendants were found guilty, and the third was acquitted. The two appealed, and this Court held the indictments deficient to support the conviction and reversed. A new indictment was returned against all three; the two who had been found guilty pled former jeopardy, and third defendant pled former jeopardy and a verdict of acquittal. The trial court overruled all those pleas. Upon trial, a verdict of guilty was returned against all three. This Court affirmed the verdict of guilty as to the two defendants who had been found guilty in the first trial, but reversed as to the one who had been acquitted. However, the Court stated at pages 669-670, with approval, the rule followed by Maryland in the case at bar.

> "The Constitution of the United States, in the 5th Amendment, declares: 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Com. v. Peters,* 12 Met. 387; 2 Hawk. P.C. Chap. 35, §3; 1 Bishop, Crim. Law, §1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached."

It was stated in *Wolkoff v. United States*, C.C.A. Ohio, 84 F. 2d 17 (1936) at page 17 that two of the essentials of legal jeopardy are that the court have jurisdiction, and that the indictment be valid. Where the indictment or information is so defective in form or substance that it will not support a conviction, it cannot form the basis of proceedings which will put accused in jeopardy and bar another prosecution. Corpus Juris Secundum, *Criminal Law*, §246-Footnote 65.

In *United States v. Lewis*, 173 F. Supp. 674 (D.C.D., Colorado, 1959) cited by the Petitioner, Lewis was convicted under counts 1 and 5 and acquitted under counts 2 and 3 of an indictment. Upon appeal on counts 1 and 5, judgment was reversed on the ground that the indictment failed to state a public offense. He was reindicted under several counts, including one similar to count 2 in his original indictment, of which he had been acquitted. Lewis pled double jeopardy and his plea was sustained. It is to be noted that the indictment in said case was held to be fatally defective for failure to state a public offense; hence it did not deprive the trial court of jurisdiction.

The declaration of the Fifth Amendment that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," is jurisdictional; and no court of the United States has authority to try a prisoner without indictment or presentment in such cases. It follows that an invalid indictment would deprive the court of jurisdiction. See *Ex Parte: In the Matter of Bain*, 121 U.S. 849 (1887).

It is interesting to note that the Court of Appeals of Maryland, in applying the principle of double jeopardy in the *Barger* case — a factual situation similar to that in *Green v. United States, supra*, reached the same conclusion.

In *Barger*, the defendant at a regular trial on a valid indictment was found not guilty of murder in the first degree and guilty of murder in the second degree. The conviction was appealed, and the Court of Appeals in *Barger v. State*, 235 Md. 556, 202 A. 2d 344 (1964), reversed the judgment and remanded the case for a new trial because the trial court erred in denying an advisory instruction with regard to the right of the accused to assert the defense of self-defense. Upon retrial under the original indictment, the lower court sustained the defendant's objection to being tried "as to murder in the first degree" and the Court of Appeals affirmed the holding that the acquittal of the defendant of murder in the first degree at the original trial barred his retrial for that offense at the new trial for murder in the second degree. Since *Green* and *Barger* were predicated on valid indictments they are distinguishable from the instant case which is based upon an invalid indictment at the option of the Petitioner.

The invalidity of the Petitioner's First indictment, trial and conviction was predicated on the following decisions of the Court of Appeals of Maryland, implemented by court order, upon which the Petitioner exercised his option.

Schowgurow v. State, supra, held that the provision of Article 36 of the Maryland Declaration of Rights requiring a belief in God as a qualification for service as a grand or petit juror was in violation of the Fourteenth Amendment to the Constitution of the United States and that a jury selected in accordance with Article 36 was improperly constituted. *Schowgurow*, the Court of Appeals ordered, was not to apply retroactively except for convictions which had not become final when the opinion was rendered.

State v. Madison, supra, held that any accused indicted or convicted by such an improperly constituted jury had the right to have the indictment dismissed or his case retried without showing actual prejudice. *Smith v. State, supra,* held that there could be an intelligent and knowing waiver of the defects in an indictment or conviction by such an improperly constituted jury.

In *Hays and Wainwright v. State,* 240 Md. 482, the Court of Appeals ruled that there need have been no challenge or objection below to such a defective indictment in order to take advantage of the constitutional defects.

In this context the Court of Appeals then ordered that the docket entries in all criminal cases in which an appeal had been noted but not perfected by the transmission of the record be sent to the Court; the Court then remanded all such cases and all the criminal appeals that had been pending in the Court, subject to identical orders that in each such case the accused could void the technically invalid indictment or the technically invalid jury verdict, or elect to go forward with the pending appeal as if the indictment or verdict were valid. To accomplish this, the following procedures were ordered:

1. The accused was to be brought into the trial court, with his counsel present, to ascertain whether he "desires to avail himself of the relief afforded by the rulings * * * [of the Court of Appeals in the above cases], or whether * * * [he] elects to waive any objections now available to him [under those decisions] * * *."

2. The accused is to be informed of his right to attack his conviction and of the fact that the court would vacate the indictment or conviction, if he moved them to do so.

3. The accused is to be advised that he is subject to re-indictment and retrial, if he elects not to abide by his present status.

4. The accused "should likewise be advised that if he be reconvicted any new sentence to be imposed might be greater or less than the one, or ones, presently against him," within maximum limits.

5. The accused is to be told that he can waive any defects in the grand or petit jury which indicted or convicted him, notwithstanding the unlawful composition of such jury.

6. If the accused elects to accept the indictment or trial jury as valid, the appeal will proceed in the Court of Appeals in the usual way, on the other grounds of error claimed.

In the case at bar, as in other similar cases, the Petitioner was given the messages the Court of Appeals said should be given him. He chose after an appropriate period of deliberation to have his indictment nullified.

This, on the record, was an intelligent, knowing and formal choice, made with the understanding and agreement that his original indictment would be declared invalid and that he could be reindicted and upon reconviction he might receive an increased sentence to which he could not object if it were otherwise in order.

There was no constitutional necessity to make *Schowgurow* retroactive at all. *Johnson v. New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882 (1966). Exercising its discretion, the Court of Appeals chose to make it retroactive to all whose convictions had not become final.* In so doing, the Court,

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* As a result 221 cases pending on appeal in the Court of Appeals of Maryland were remanded to the lower court so that the accused could exercise his or her option to be reindicted. *Statistics of the Administrative Office of the Courts.* Far more numerous were the cases at various stages in the criminal courts of the counties of the State. While no accurate statistics are available, in one jurisdiction alone — Baltimore City — 1061 reindictments were secured through the years 1966 and 1967. *Report of the State's Attorney for Baltimore City 1965-66 and 1966-67.*

in effect, attached the condition that under the peculiar and limited circumstances, if an accused accepted the benefits of *Schowgurow's* selective retroactivity, he assumed the risk of being reindicted, convicted and that his next sentence might be greater than the one he was voiding.

The reason for the defense of double jeopardy at common law and in the constitutional and statutory provisions incorporating the common law concept was to prevent the citizen from vexatious criminal prosecutions by the institution by prosecutors of additional prosecutions for the crime for which the accused had been formerly acquitted or convicted. It was not designed to defeat the principal purpose of the criminal law, which, apart from its reformatory effect, is designed to protect society and to prevent crime. When the Petitioner exercised his option to void his original indictment within constitutional and procedural safeguards outlined by the Court of Appeals, the indictment became a nullity and the case proceeded as if the first indictment, trial, conviction, and acquittal had never been had. Said indictment was not *partly valid* and *partly invalid*. Each count of the indictment was invalid. Hence, the conviction and acquittal on the counts were not valid in part and invalid in part.

Furthermore, there is no reason in logic or justice to permit the Petitioner to maintain that one count of his original indictment is invalid but, at the same time, assert that the other count of it is valid and affords him protection. The Petitioner had the advice of counsel in regard to the problems which would be presented by exercising his option and it would appear not to put any abnormal or unjust burden upon him to determine what his best interest required so far as a new indictment was concerned.

On the contrary, it would appear that to permit the Petitioner to avail himself of the favorable part of his indict-

ment and to challenge the unfavorable portion, places the State of Maryland in an unfair and unjust position both theoretically and practically.

Articulation of the policies to be served by the double jeopardy provision should not obscure the presence of an important countervailing consideration, the interest of society in preventing the guilty from going unpunished. While overemphasis of this factor may lead to abuse and a deprivation of the rights of the accused, in circumstances where the risk of harrassment is slight and that of improper acquittal is great, the State's interest in securing convictions should be given considerable weight.

The invocation of the Fifth Amendment bar to the instant case "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibition is aimed." *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949). Furthermore, the initial indictment of the Petitioner was terminated by his own action because of a relatively objective "breakdown in judicial machinery." (See *Gori v. United States*, 367 U.S. 364, 370 (1961) (Douglas, J., dissenting)), rather than because of improper conduct on error on the part of the prosecutor or judge. Hence, double jeopardy should not apply. In addition, the action of the Petitioner in nullifying his original indictment, trial and conviction, under the circumstances must be construed as consenting to termination of the former proceedings. (See *Gori v. United States*, *supra*, Note 58 at 370 (Douglas, J., dissenting)).

Considering all the facts and the applicable law pertaining thereto, the Petitioner was not "twice put into jeopardy."

III.

The Petitioner Was Not Prejudiced By Standing Trial on the Larceny Charge Together with the Charge of Burglary.

While the Petitioner concedes that the charge of burglary was valid, he raised the issue in the Court of Special Appeals of Maryland that he was prejudiced as a result of the larceny charge. In support thereof he argued that the fact that the judge at his second trial imposed a greater sentence than the one received at his first trial "evinces the prejudicial effect which the prosecution for larceny together with burglary must have had upon the court." Other than this bald allegation, he cited no cases on point in support of this nominal proposition, nor does he explain why this prejudicial effect resulting in a greater sentence would only occur at the second trial and not at the first trial, when the record indicates that he was tried on the larceny count at both trials.

Assuming, arguendo, that the second indictment larceny count was invalid, the statement of Justice Fortas in his dissent in *Cichos, supra,* as quoted in the Petitioner's brief, is inapposite. In the case at bar, Petitioner was not exposed to the hazards of prosecution and conviction for a more onerous offense but a less onerous offense, and while one may speculate that a two count indictment offers a jury a choice, in the case at bar, unlike *Cichos, supra,* the jury disposed of this contention by finding a verdict of guilty on both counts.

IV.

Petitioner Was Not Subjected To Double Jeopardy in Another Form When He Received A Greater Punishment For The Same Offense In The Second Trial.

A review of the record in the instant case will indicate that the issue of increased punishment was not raised in

the Court of Special Appeals of Maryland and hence it is not before this Honorable Court. *Ellis v. Dixon,* 349 U.S. 458, 99 L. Ed. 1231, 75 S. Ct. 850 (1955), rehearing denied 350 U.S. 855, 100 L. Ed. 759, 76 S. Ct. 37 (1955); Title 28, Rule 19, Revised Rules of the Supreme Court of the United States. Furthermore, in the Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, Petitioner maintained that to increase punishment after a successful appeal amounted to cruel and unusual treatment. Now, in the sunshine of appellate review, and in order to crawl under the cover of the limitations of said review, he maintains that said increase in punishment was double jeopardy, relying on *Patton v. N. Car.,* 381 F. 2d 636 (1967), cert. denied.

In *Patton,* the court said the question to be answered was whether a defendant may be sentenced to a longer term of imprisonment at his second trial than he received after his first conviction, vacated on constitutional grounds. Its answer was than under no circumstances can he be. Three reasons were given — denial of due process, lack of equal protection, and double jeopardy. The due process clause of the Fourteenth Amendment, said the court, does not permit the "fiction" that a reversal on appeal wipes out all that went before, and that by appealing, the accused is deemed to have assumed the risk of a greater sentence. As to double jeopardy, the court stated at pages 643-644, 645-646:

> "Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules, prohibiting (1) reprosecution for the same offense following acquittal, (2) reprosecution for the same offense following conviction, and (3) multiple punishment for the same offense. * * *."
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> "* * * Thus, unless a defendant is held to waive this double jeopardy protection in seeking a new trial, a

harsher penalty may not be imposed. And we have already declared, in Part II of this opinion, that we decline to predicate a prisoner's exercise of his right to seek a new trial on the fiction that he has 'waived' the benefits of his initial sentence, because of the restrictive effect this has on access to post-conviction remedies."

In its opinion dated July 3, 1968 in *Moon v. State*, ... Md. ....., 243 A. 2d 564 (1968), the Court of Appeals of Maryland considered the *Patton* case. The factual situation of *Moon* was that the defendant was convicted of armed robbery and sentenced to twelve (12) years. *Schowgurow, supra,* gave him the opportunity to elect to have his indictment nullified, and he did. On retrial he was again found guilty of armed robbery and also of larceny and intent to murder, for which he had not been tried the first time. The lower court sentenced him to twenty (20) years for armed robbery, with credit for the time he had served, and suspended ten (10) year sentences on each of the other counts. The Court of Special Appeals of Maryland affirmed the judgment and sentences (*Moon v. State,* 1 Md. App. 569) on the authority of *Hobbs v. State,* 231 Md. 533, cert. denied 375 U.S. 914 (1963) in which the Court of Appeals of Maryland held that after the convicted man had won a reversal the judge on reversal could impose a greater punishment than had been previously imposed. The Court of Appeals stated:

"We perceive no present constitutional obstacle to continuing to follow the flat rule laid down in *Hobbs.* The Supreme Court has not disturbed increased sentences on retrial. It did not do so in *Hobbs.* See also *Stroud v. United States,* 251 U.S. 15, 64 L. Ed. 103 (1919) (in which, on retrial, a death sentence replaced a life sentence given at the first trial); *Robinson v. United States* (6th Cir. 1944), 144 F. 2d 392, *aff'd* 324 U.S. 282, 89 L. Ed. 944 (1945) (a death sentence re-

placed a life sentence). See also *Green v. United States*, 355 U.S. 184, 194, 2 L. Ed. 2d 199, 208 (1957), Note 15 (in which a jury's finding of second degree murder was held to be an implied acquittal of first degree murder which precluded again putting the accused in jeopardy for first degree murder) — 'Stroud * * * is clearly distinguishable'; *Cichos v. Indiana*, 385 U.S. 76, 17 L. Ed. 2d 175 (1966). In *United States v. Tateo*, 377 U.S. 463, 12 L. Ed. 448 (1964), both *Stroud* and *Robinson* are cited as existing and viable authority. The Supreme Court denied certiorari in *Patton*, 390 U.S. 905 (1968), but at 389 U.S. 889 it also denied it in *United States ex rel. Starner v. Russell* (3rd Cir. 1967), 378 F. 2d 808, which had refused to follow *Patton* and had reached an opposite result.

"We are unpersuaded that *Patton* is sound. There the Court enacted a flat prophylactic rule which it rationalized as constitutionally required, seemingly because it was convinced that out of bitterness, bias, spite or prejudice state judges on retrial would give increased sentences which bore no proper relation to the fair administration of justice, and that in the rare instances in which this was not so, the second sentences could not be found from the record not to have reflected such prejudice or improper motives. This attitude of knowing judicial pragmatism led to the Procrustean holding, which we think is unwarranted and undesirable in its absolute inflexibility.

"No appellate court to our knowledge has followed *Patton* in finding a constitutional necessity for entire inflexibility,[1] although if reliance is put on double jeopardy this result is almost inevitable. See Van Alstyne, *In Gideon's Wake: Harsher Penalties and the 'Successful' Criminal Appellant*, 74 Yale L.J. 606, 611 (1965); see also *Retrial of the Successful Criminal Appellant: Harsher Punishment and Denial of Credit for Time Served*, 28 Md. L. Rev. 64 (1968).

"[1] California, Oregon and New Jersey Courts have reached similar conclusions essentially as a matter of

procedural fairness under state law. See People v. Henderson (Cal. 1963), 386 P. 2d 677; State v. Turner (Ore. 1967), 429 P. 2d 565; State v. Wolf (N.J. 1966), 216 A. 2d 586."

The Court of Appeals went on to state that various federal courts had rejected the view *Patton* took and had refused to follow its holdings. See *United States v. Ellenbogen* (2nd Cir. 1966), 365 F. 2d 982, referred to in *Coke v. United States* (S.D.N.Y. 1968), 280 F. Supp. 97, 102; *United States ex rel. Starner v. Russell* (3 Cir. 1967), 378 F. 2d 808, 810, 811-12, cert. denied 389 U.S. 889 (1967); *United States v. White* (7 Cir. 1967) 382 F. 2d 445, 448. Other similar holdings and rejections of *Patton* include *United States v. Sanders* (E.D. Cal. 1967), 272 F. Supp. 245; *Rice v. Simpson* (M.D. Ala. 1967), 274 F. Supp. 116; *United States ex rel. Davis v. Brierly* (M.D. Pa. 1967), 274 F. Supp. 1006, 1007 — "Patton is not the law in this circuit"; *United States v. Fairhurst* (3 Cir. 1968) 388 F. 2d 825; *State v. Brown* (N.C. 1967), 156 S.E. 2d 272; *Salisbury v. Grimes* (Ga. 1967), 158 S.E. 2d 412; *State v. Jacques* (Super. Ct. N.J. 1968) 239 A. 2d 252.

There was no constitutional, to wit double jeopardy, bar to the giving of increased sentence and a review of the record would support factually its permissibility and propriety.

CONCLUSION

For the foregoing reasons, the Respondent submits that the convictions of the Petitioner should be affirmed.

Respectfully submitted,

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